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8 MUHAMMAD KHAN,
9 Plaintiff,
10 v.
11 M. PAYTON,
12 Defendant.

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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 Case No. 20-cv-03086 BLF (PR)

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28 **ORDER DISMISSING NON-COGNIZABLE CLAIMS; OF SERVICE AND SETTING BRIEFING SCHEDULE; DIRECTING DEFENDANTS TO FILE DISPOSITIVE MOTION OR NOTICE REGARDING SUCH MOTION; INSTRUCTIONS TO CLERK**

Plaintiff, a state prisoner, filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against an officer at San Quentin State Prison (“SQSP”). Dkt. No. 1. The Court screened the amended complaint and granted leave to amend an equal protection claim. Dkt. No. 22. In the alternative, Plaintiff was advised that he may file notice to proceed solely on the cognizable claims identified in the order. *Id.* at 8. Plaintiff was granted two extensions of time to file a second amended complaint, giving him until May 2, 2022. Dkt. Nos. 28, 32. Plaintiff was advised that in the alternative, he may file notice that he wishes to proceed solely on the cognizable claims, and strike equal protection claim from the action, and that failure to respond in the time provided would result in the dismissal of the equal protection claim for failure to state a claim and this matter proceeding on the

1 cognizable claims. Dkt. No. 32 at 2. The deadline has passed, and Plaintiff has filed no
2 response. Accordingly, this matter shall proceed on the cognizable claims and the equal
3 protection claim shall be dismissed for failure to state a claim.

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5 DISCUSSION

6 A. Standard of Review

7 A federal court must conduct a preliminary screening in any case in which a
8 prisoner seeks redress from a governmental entity or officer or employee of a
9 governmental entity. *See 28 U.S.C. § 1915A(a)*. In its review, the court must identify any
10 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
11 upon which relief may be granted or seek monetary relief from a defendant who is immune
12 from such relief. *See id. § 1915A(b)(1),(2)*. Pro se pleadings must, however, be liberally
13 construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
15 elements: (1) that a right secured by the Constitution or laws of the United States was
16 violated, and (2) that the alleged violation was committed by a person acting under the
17 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

18 B. Plaintiff’s Claims

19 In the screening order of the amended complaint, the Court found the following
20 cognizable claims:

21 As the Court previously found, [Dkt. No. 13], liberally construed, Plaintiff
22 states a cognizable claim under the First Amendment for the denial of
23 meals necessary for the free exercise of his religion, *see Ward v. Walsh*, 1
24 F.3d 873, 877 (9th Cir. 1993) (Jewish inmate claiming denial of kosher
25 diet), *cert. denied*, 510 U.S. 1192 (1994); *Moorish Science Temple, Inc. v.*
26 *Smith*, 693 F.2d 987, 990 (2d Cir. 1982) (Muslim inmate claiming denial of
27 proper religious diet), and a cognizable Eighth Amendment claim for the
deprivation of food for two days, *see Johnson v. Lewis*, 217 F.3d 726, 731,
732-733 (9th Cir. 2000). The Court also finds the amended complaint,
liberally construed, states a cognizable due process claim based on the

1 arbitrary denial of Ramadan meals by Defendant Payton. *See Sandin v.*
2 *Conner*, 515 U.S. 472, 484 (1995). The Court will also exercise
3 supplemental jurisdiction over Plaintiff's state law claims for intentional
4 infliction of emotional distress and negligent hiring/training/supervising
which are adequately pleaded. *See United Mine Workers v. Gibbs*, 383
U.S. 715 (1966).

5 Dkt. No. 22 at 4-5. The Court dismissed Plaintiff's RLUIPA¹ claim and state claim under
6 the California Government Code § 19572 for failure to state a claim for relief. *Id.* at 6-7.
7 Because Plaintiff has not amended the deficient allegations, his equal protection claim is
8 DISMISSED for failure to state a cognizable claim. *Id.* at 7-8.

10 CONCLUSION

11 For the reasons state above, the Court orders as follows:

12 1. This action shall proceed on the claims under the First Amendment, Eighth
13 Amendment, due process, and state law claims against Defendants Payton and Healy. All
14 other claims are dismissed for failure to state a claim. Accordingly, Defendant CDCR
15 shall be dismissed from this action as all claims against this defendant have been
16 dismissed. The Clerk shall terminate the CDCR from this action.

17 2. Defendant Payton has already been served in this matter. Dkt. No. 13.
18 Accordingly, only the following defendant at SQSP shall be served:

19 a. **Correctional Officer Healy**

20 Service on the listed defendant(s) shall proceed under the California Department of
21 Corrections and Rehabilitation's (CDCR) e-service program for civil rights cases from
22 prisoners in CDCR custody. In accordance with the program, the clerk is directed to serve
23 on CDCR via email the following documents: the amended complaint, and any
24 attachments thereto, Dkt. No. 18, a copy of the court's "Order Screening First Amendment
Complaint; of Partial Dismissal," Dkt. No. 22, this order of service, a CDCR Report of E-

27 ¹ Religious Land Use and Institutionalized Person Act, 42 U.S.C. § 2000cc-1(a).

1 Service Waiver form and a summons. The clerk also shall serve a copy of this order on the
2 plaintiff.

3 No later than 40 days after service of this order via email on CDCR, CDCR shall
4 provide the court a completed CDCR Report of E-Service Waiver advising the court
5 which defendant(s) listed in this order will be waiving service of process without the need
6 for service by the United States Marshal Service (USMS) and which defendant(s) decline
7 to waive service or could not be reached. CDCR also shall provide a copy of the CDCR
8 Report of E-Service Waiver to the California Attorney General's Office which, within 21
9 days, shall file with the court a waiver of service of process for the defendant(s) who are
10 waiving service.

11 Upon receipt of the CDCR Report of E-Service Waiver, the clerk shall prepare for
12 each defendant who has not waived service according to the CDCR Report of E-Service
13 Waiver a USM-205 Form. The clerk shall provide to the USMS the completed USM-205
14 forms and copies of this order, the summons and the operative complaint for service upon
15 each defendant who has not waived service. The clerk also shall provide to the USMS a
16 copy of the CDCR Report of E-Service Waiver.

17 3. No later than **ninety-one (91) days** from the date this order is filed,
18 Defendants shall file a motion for summary judgment or other dispositive motion with
19 respect to the claims in the complaint found to be cognizable above.

20 a. Any motion for summary judgment shall be supported by adequate
21 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
22 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
23 qualified immunity found, if material facts are in dispute. If any Defendant is of the
24 opinion that this case cannot be resolved by summary judgment, he shall so inform the
25 Court prior to the date the summary judgment motion is due.

26 b. **In the event Defendants file a motion for summary judgment, the**
27 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**

1 **warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**
2 ***Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

3 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
4 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
5 motion is filed.

6 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and
7 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment
8 must come forward with evidence showing triable issues of material fact on every essential
9 element of his claim). Plaintiff is cautioned that failure to file an opposition to
10 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to
11 the granting of the motion, and granting of judgment against Plaintiff without a trial. *See*
12 *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18
13 F.3d 651, 653 (9th Cir. 1994).

14 5. Defendants shall file a reply brief no later than **fourteen (14) days** after
15 Plaintiff's opposition is filed.

16 6. The motion shall be deemed submitted as of the date the reply brief is due.
17 No hearing will be held on the motion unless the Court so orders at a later date.

18 7. All communications by the Plaintiff with the Court must be served on
19 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
20 copy of the document to Defendants or Defendants' counsel.

21 8. Discovery may be taken in accordance with the Federal Rules of Civil
22 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
23 Rule 16-1 is required before the parties may conduct discovery.

24 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
25 court informed of any change of address and must comply with the court's orders in a
26 timely fashion. Failure to do so may result in the dismissal of this action for failure to
27 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

1 10. Extensions of time must be filed no later than the deadline sought to be
2 extended and must be accompanied by a showing of good cause.

3 **IT IS SO ORDERED.**

4 Dated: May 11, 2022


BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California